No. 11,018

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FERNAND CHEVILLARD and GEORGE PATRON,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' CLOSING BRIEF.

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A reading of the brief for appellee indicates a short reply thereto, as the attorneys for appellee have, in some instances, not directed their arguments to the points raised by appellants but have raised their own questions and supplied answers thereto.

THE INSUFFICIENCY OF THE SECOND COUNT OF THE INDICTMENT.

The United States argues that the indictment is sufficient and that if any additional facts were necessary in order to prepare appellants' defense such facts could have been procured by a bill of particulars. There are two answers to this contention.

An indictment must contain facts charging the commission of a crime and no deficiencies in this regard can be supplied by a bill of particulars. (*Floren v. United States,* 186 Fed. 961, 964; *May v. United States,* 199 Fed. 53; *Collins v. United States* (C.C.A. 9), 253 Fed. 609.)

The second answer to the Government's contention is that a motion for a bill of particulars was made and denied by the trial Court. (R. 15.)

The Government argues the sufficiency of the second count on the following grounds: that the indictment charged that the defendants diverted certain meat from a shipment from the Ed Heuck Company to the WSA and converted such meat to their own use, that this diversion was concealed and covered up by causing the WSA to issue to the Ed Heuck Company a receipt for the full amount of the shipment. Merely to allege that the doing of a certain act accomplished a certain result is not sufficient. The act described must be one that would reasonably and probably bring about the claimed result. Just how the issuance of a receipt by the WSA could have concealed any fact from that Government Agency rests solely in the realm of surmise and conjecture. Besides, this count of the indictment does not allege that the shipment delivered was less the poundage involved in the diversion and conversion. From all that appears from the indictment the WSA received every pound of meat ordered. The indictment does not allege that the purloining of this meat was done after the delivery to the WSA,

but, on the contrary, alleges that it was extracted from the shipment to be delivered to the WSA. The indictment is only susceptible of the construction that any receipt issued by the WSA to the Ed Heuck Company could only have resulted in misleading the Ed Heuck Company.

An indictment is to be construed against the pleader. The language used in an indictment must necessarily import the offense charged and if susceptible of a different interpretation or if susceptible of two interpretations, one showing the commission of the crime and the other showing the accused's innocence, the interpretation leading to innocence must be adopted. (*Williamson v. United States,* 207 U. S. 425, 458, 52 L. Ed. 278, 294; *Johnson v. United States,* 95 Fed. (2d) 813; 42 *C. J. S.,* p. 990.)

In the instant case count two of the indictment is susceptible of the construction that the WSA received the whole amount of meat ordered, and thus the issuance of a receipt in like amount could not have concealed any material fact from that agency of the Government. The indictment on its face fails to state any fact showing how the issuance of the receipt could have concealed any material fact from the knowledge of the WSA. No act committed by the WSA could possibly be charged as a concealment of a material fact on the part of the appellant.

Assuming everything set forth in the second count to be correct it fails to establish the commission of any offense on the part of appellants.

The Government meets our objection to the failure of the indictment to set forth the receipt on the ground that "the receipt referred to in count two of the indictment is not, as in counterfeiting or forgery, the subject matter of the litigation and therefore need not have been set out in haec verba in the indictment". On the contrary, the receipt is the subject matter of the litigation. It is the trick, scheme, and device on which the Government relied.

AS TO THE INSUFFICIENCY OF THE EVIDENCE TO SUPPORT COUNT TWO.

The Government seeks to uphold the convictions as to the second count on the theory that as appellants aided and assisted in the diversion of the meat it was not necessary that they be present when the receipt was signed and refer to three cases in support of this contention. The contention is unsound and finds no support in the cases cited. The very argument presented by the Government shows that the activities of appellants were confined solely to procuring the truck load of meat from the Ed Heuck Company and did not embrace the concealment of such fact from the War Shipping Administration. The diversion of the meat was all that appellants agreed to participate in and this diversion was and could have been successfully accomplished without concealing anything from the War Shipping Administration.

The cases relied on by the Government must be considered in the light of the facts disclosed by the record

in each such case. Thus, in *Borgia v. United States,* 78 Fed. (2d) 550, the defendants were charged with attempting to defraud the United States of taxes on distilled spirits, with possession and custody of a still, etc., and with conspiring to do such things, all resulting from selling certain materials to people unlawfully operating a still. This Court held that defendants having knowledge of the use to which the materials were to be applied, together with other acts done by the defendants, justified the conclusion that they conspired with the owners of the still to its illegal operation. This reasoning would apply if the appellants herein were charged with conspiring to divert or steal the meat, but does not apply to a wholly unnecessary act of which they had no knowledge and of which there was no proof that they ever knew such act was to be committed.

The case of *Collins v. United States,* 20 Fed. (2d) 574, is subject to the same criticism. There the defendant was charged as a principal and aider and abettor in the robbery of a mail train. The facts show that he conspired with those who actually perpetrated the robbery. Defendant was charged with the stealing, taking and carrying away and with aiding and assisting in so doing five United States mail bags. These particular five bags never came into his possession. The Court held that he conspired that the mail train be robbed and he was guilty as a principal in such robbery.

In both of the foregoing cases the conviction was upheld because the record showed an actual agreement

on the part of the defendant to do the very act charged in the indictment.

In the other case of *Collins v. United States,* 65 Fed. (2d) 545, a sheriff and his deputy were charged with having conspired with others to violate the National Prohibition Act by importing and transporting intoxicating liquors. The evidence showed an actual agreement on the part of defendants and their participation in the prior arrangements for the commission of the very act set forth in the indictment. In the instant case the agreement was only to steal the meat, not to cause a false receipt to be issued by the WSA.

The Government argues, against our contention, that the facts failed to show that defendants knew the meat belonged to the War Shipping Administration, that the facts "create a logical inference that they were aware of such facts". In a criminal case it requires more than a logical inference to establish a material fact. Such fact must be established to a moral certainty and beyond a reasonable doubt.

The argument that several hours after the bill had been receipted by the checker knowledge then acquired by appellants that the meat was stamped for the Government cannot relate back and make the issuance of the receipt a criminal act of the appellants. Even then, at such time, appellants had no knowledge that such receipt had been issued by the WSA. Not only intent is necessary to constitute the crime set forth in the indictment but knowledge is also essential.

AS TO ERRORS IN THE COURT'S INSTRUCTIONS.

The Government attempts to uphold the erroneous instructions given by the district judge as to what constitutes one an aider and abettor in the commission of a crime on the grounds that the Court used the word "knowingly" and this was the same as telling the jury that a criminal intent was necessary. One may knowingly commit acts which result in the commission of a crime without intending that such crime be committed. One may innocently do such things and not be subject to prosecution or punishment.

To tell the jury that there must exist a joint operation of act and intent in every crime is not the same as telling the jury that an aider and abettor must act with an intent that a specific crime be accomplished.

ERRORS IN THE REFUSAL TO GIVE REQUESTED INSTRUCTIONS.

The failure of the Court to instruct according to appellants' requested instruction No. 3, to the effect that in determining the credibility of Barral they had a right to take into consideration the fact that he had pleaded guilty and was awaiting sentence, in determining whether he was testifying under the expectation of immunity or leniency and that his testimony was therefore biased and prejudiced, was highly prejudicial. This instruction was not cured by the other portions of the charge. General rules for determining the credibility of all witnesses were insufficient to properly present the Barral situation to the jury. The

general instruction that the testimony of an accomplice should be received with caution, etc., could as easily apply to one who was not awaiting sentence as to one who was. Such instruction did not cover the points raised in the requested instructions.

The refusal to give the requested instruction dealing with each link in the chain of circumstantial evidence and that such link must be established to a moral certainty and beyond a reasonable doubt was not cured by a general instruction that the entire evidence must be consistent with guilt and inconsistent with any other rational conclusion. The law of circumstantial evidence is that each material fact in the chain of proof must be proven to a moral certainty and beyond a reasonable doubt. This is entirely different from allowing a jury to consider every essential fact, irrespective of whether each such fact produces conviction to a moral certainty and beyond a reasonable doubt, and from all such facts, irrespective of the degree to which each is proven, allow the jury to draw the ultimate conclusion of guilt. Jurors easily could find that certain material facts were not established to a moral certainty and beyond a reasonable doubt, yet upon the whole case arrive at the conclusion of the guilt of the defendant. The law does not allow verdicts based upon such reasoning and appellants were entitled to an instruction which would properly guide the jury in such a vital matter.

The Supreme Court of California, in a case decided on February 19, 1946, has clearly pointed out the right of a defendant to have specific instructions given as

to a material element in either the charge or the defense. Section 1096 of the California Penal Code contains a statutory instruction on the doctrine of reasonable doubt. Section 1096A provides that no further instruction on the subject need be given. In *People v. Kane,* 27 A. C. 709, the Court gave the statutory instruction on reasonable doubt. Defendant requested specific instructions relative to particular elements of the charge and that each such particular element had to be established to a moral certainty and beyond a reasonable doubt. The trial Court refused to give the requested instruction on the theory that the general statutory charge was sufficient. The Supreme Court held that defendant was entitled to such specific instructions, stating:

> "The proposed instructions, although not grammatically perfect, are correct and simple statements of law pertinent and material to defendant's theory of the case and show its application to the evidence introduced. In *People v. Eckert* (1862), 19 Cal. 603, 605, this court said: 'The fact pointed out by this instruction it was material for The People to prove, in order to establish the defendant's guilt under the other circumstances of this case, and as the charge given by the Court as to reasonable doubt, though appropriate, was general in its terms, the defendant had a right to ask an instruction that if there was a reasonable doubt as to this essential fact, the defendant should have the benefit of it.' Defendant here was entitled to have the jury advised directly and clearly as to the law applicable to the defense to the charge of robbery in order that they should have clearly in

mind that the taking, even though it was with a display of force, to constitute robbery, must have been actually against the will of Miss Echols, not with her connivance or abetment, and not merely against the will of the owner of the money. The essential, and to a layman somewhat fine, distinction between robbery and grand theft, the definitive attributes of an accomplice (Pen. Code, §§ 31 and 1111), and the application of the doctrine of reasonable doubt to the most important and difficult question presented to the jury, should not have been left either wholly unexplained or derivable only from inference."

CONCLUSION.

All other points discussed in the Government's brief have been fully answered in the opening brief of appellants.

Dated, San Francisco,
March 18, 1946.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Appellants.